IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BERNHARD HEMBACH, as Trustee in Bankruptcy of Escom AG and Amiga Technologies GmbH GmbH, Plaintiff,	:	CIVIL ACTION
v.	:	NO. 97-3900
QUIKPAK CORPORATION AND DAVID ZIEMBICKI, Defendants.	:	

M E M O R A N D U M

BUCKWALTER, J. January 8, 1998

I. Introduction

Currently before the court are Plaintiff's Motion to dismiss Defendants' Counterclaims I-IV for breach of contract and for promissory estoppel; Plaintiff's Motion for Partial Summary Judgment as to Counts I and II of its Complaint, which he contends would entitle it to either possession of the disputed inventory, or, in the alternative, the inventory's cash value; Plaintiff's Motion for Summary Judgment on Defendants' counterclaims for declaratory judgment pursuant to 28 U.S.C. §§ 2201 & 2202; and Defendants' Motion to Strike certain portions of Plaintiff's Declaration.

For the reasons that follow, the court will 1) dismiss defendants' counterclaims without prejudice to their asserting

them in the Escom/amiga bankruptcy proceedings in Bensheim, Germany; 2) deny plaintiff's motion for summary judgment without prejudice; 3) deny defendants' request for declaratory judgment as moot; and, 4) deny defendants' motion to strike.[1]

II. Background

Plaintiff Bernhard Hembach ("Hembach") is the bankruptcy trustee for the German corporations Escom AG ("Escom"), and its wholly-owned subsidiary Amiga Technologies GmbH ("Amiga"). Both Escom and Amiga manufactured and sold computers and computer products. This litigation stems from Amiga's relationship with the defendants, QuikPak Corporation ("QuikPak") a Pennsylvania computer-assembly company, and its president, David A. Ziembicki.[2]

Amiga used QuikPak to assemble its Amiga-brand computers. In order to facilitate its orders, Amiga purchased the component parts used to manufacture its computer chip sets and shipped them to QuikPak's Norristown plant. These parts make up the disputed inventory ("Inventory").

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1. The court agrees that the challenged portions of Hembach's declaration are of limited value, because they contain legal conclusions about events occurring before Hembach was appointed trustee in this matter. The court will deny the motion, however, as its resolution of these motions does not rely on Hembach's enunciation of those conclusions.

2. Hembach offers no reasons why Ziembicki should be held personally liable, and this memorandum and the accompanying order will be limited to QuikPak, Inc.

In response to QuikPak's price quotations, Amiga twice issued purchase orders for the assembly of a combined 4500 computers. Although Amiga's purchase order contained its own terms and conditions, QuikPak contends that the parties agreed, orally, in June 1995 that the entire relationship would be controlled by QuikPak's standard terms and conditions, including the following:

> Customer grants QuikPak a security interest in all tangible [sic] included within the Work and agrees immediately to sign and/or file such documents and take such other actions as QuikPak may from time to time request in writing to perfect the same and in furtherance of its security interest, QuikPak is authorized, in the event of nonpayment, to retain or to enter any location and remove any tangibles subject to such security interest for nonpayment.

Standard Terms and Conditions, ¶ 3.

It is undisputed that, subsequent to the manufacture of 4500 computers, Amiga issued no additional purchase orders to QuikPak. Further, QuikPak does not dispute that Amiga paid it for the those computers. There were, however, discussions between Amiga and QuikPak, involving several persons of uncertain authority, about Amiga's intention to place further orders with QuikPak. Despite the lack of purchase orders or any written agreement, QuikPak argues that Amiga ordered an additional 15,000-22,000 computers, because Amiga's representative accepted a June 1995 price quotation for the manufacture of 400 computers a week, which committed QuikPak to the purchase of at least

15,000 more computers. It has also said that Amiga approached it in October 1995 about manufacturing 6,000 units, and that an article in the Philadelphia Inquirer discussed Amiga's intention to have QuikPak manufacture 10,000 computer units.

On July 15, 1996, Escom and Amiga filed for bankruptcy in the Bensheim, Germany Magistrate's Court, which appointed Hembach as bankruptcy trustee. On July 18, 1996, Hembach agreed to sell the inventory to a third party in order to raise money for the estate. The sale did not take place, however, because on September 19, 1996, QuikPak notified the third party that it was taking possession of the inventory, which it valued at $3,150,000, in full satisfaction of Amiga's debt of $3,526,196, for lost profits for those computers which Amiga allegedly ordered but did not pay for, and for its costs in preparing for the manufacture of Amiga computers. QuikPak stated its understanding that German Bankruptcy law permitted it to invoke self-help, a position it has not consistently maintained.

On June 6, 1997 Hembach filed a complaint in this court alleging counts under Pennsylvania law for conversion, replevin, unjust enrichment and breach of contract, and under federal law for trademark infringement and unfair competition. 15 U.S.C. §§ 1114 & 1125 (a). In its Answer, QuikPak counterclaimed for breach of contract and promissory estoppel, and it also sought declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

Hembach now moves to dismiss QuikPak's counterclaims, and he also seeks partial summary judgment on his conversion and replevin counts, and as to defendants' counts for declaratory judgment. Hembach represents that entry of summary judgment in his favor would entitle it to either a writ of possession of the inventory, or alternatively to a judgment for $3,150,000, i.e., the amount at which QuikPak valued the inventory when it took control of it. QuikPak opposes the motions to dismiss and for summary judgment and moves in turn to strike those portions of Hembach's declaration -- attached to the motion for summary judgment -- which relate to events before June 1996.

III. Discussion

A. Comity and QuikPak's Counterclaims

Amiga invokes the doctrine of comity in support of its motion to dismiss QuikPak's counterclaims for promissory estoppel, breach of contract and declaratory judgment. Under that doctrine, judgments obtained in foreign courts are accorded the "recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another." Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971). While comity does not rise to the level of a legal imperative, courts should extend it unless "its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect." Id.; see Hilton v.

Guyot, 159 U.S. 113 (1895); Philadelphia Gear Corp. v. Gear de Mexico, S.A., 44 F.3d 187 (3d Cir. 1994); In Re Christoff's Estate, 192 A.2d 737 (Pa. 1964). Comity is appropriate in the bankruptcy context in order to maximize the efficient liquidation and allocation of the estate's assets. See In Re Maxwell Communication Corp. plc. by Homan, 93 F.3d 1036 (2d Cir. 1996) (collecting cases). Federal courts should exercise comity where the foreign bankruptcy court shares our "fundamental principle that assets be distributed equally among creditors of similar standing," but the court should not require "American creditors to participate in foreign proceedings in which their claims will be treated in some manner inimical to this country's policy of equality." Remington Rand Corporation-Delaware v. Business Sys. Inc., 830 F.2d 1260, 1267-68 (3d Cir. 1987).

The court finds that Hembach has made a prima facie showing that the court should extend comity to the German proceedings, because he has demonstrated that 1) the German bankruptcy laws "share[] our policy of equal distribution of assets," and 2) the German bankruptcy law either mandates or authorizes a stay of all proceedings against the bankrupt.[3] Philadelphia Gear, 44 F.3d at 193. These general attributes of the German bankruptcy system are readily ascertainable from the

3. Similar to 11 U.S.C. § 362 (a)(1), section 14 of the German bankruptcy code provides for a stay of legal actions against the bankrupt and prohibits individual executions against the assets of the bankrupt's estate.

treatise excerpts provided by Hembach, and QuikPak has not cast doubt on these conclusions.

In light of this showing, the court must then evaluate, somewhat redundantly, "whether the foreign bankruptcy court is a duly authorized tribunal, whether the foreign bankruptcy law shares our policy of equal distribution of assets, whether forcing the United States creditor to prosecute its claim in the foreign court" would run counter to the American bankruptcy policy of equality, and whether QuikPak will be prejudiced by the stay. Id. at 194. Further, this court would abuse its discretion to extend comity to the German bankruptcy proceedings if the German courts did not afford QuikPak due process. Remington, 830 F.2d at 1266.

It is clear that the German court in Bensheim is the proper tribunal to adjudicate the Escom/Amiga Bankruptcy, and the court also finds that Germany's bankruptcy law shares with American law the key principle of equality of creditors of similar standing. Moreover, there is no showing that dismissing the counterclaims without prejudice would be inimical to this country's policy of equality; in fact, not dismissing them would run counter to that policy. QuikPak argues that comity is not appropriate because, under German law, all creditors are not treated equally, but, as Hembach notes, QuikPak blurs the distinction between treating all creditors equally, which the

American system does not do, and treating all similarly-situated creditors equally, which both the American and German systems do. In this instance, not extending comity would work an inequality to Amiga's other creditors by allowing QuikPak preferred treatment.

QuikPak points to its difficult dealings with Hembach, who, it believes, has prejudged its claims, but the court does not find these disputes to be fatal to QuikPak's fair treatment by the German courts. A difficult relationship with the bankruptcy trustee is not unusual in a foreign or a domestic bankruptcy, and German law affords QuikPak a framework for the resolution of disputes between the trustee and a creditor. See Daniels v. Powell, 604 F.Supp. 689, 694 (N.D. Ill. 1985) ("Even if the allegations of fraud and conflict of interest made here were true and properly substantiated, the proper forum to challenge such a conflict of interest . . . is the Bermuda Supreme Court.").

As for prejudice to QuikPak, it is obvious that both sides would prefer to litigate these issues closer to home, but the desirability of locating claims against the bankrupt in one court also argues for declining to adjudicate QuikPak's counterclaims. QuikPak has a forum in which to raise its claims, and is represented by German counsel, it will not be significantly prejudiced by proceeding there. See Remington, 830

F.2d at 1271 ("Creditors of an insolvent foreign corporation may be required to assert their claims against a foreign bankrupt before a duly convened foreign bankruptcy tribunal."); see also Canada Southern Ry Co. v. Gebhard, 109 U.S. 527, 537-38 (1883). Accordingly, the court will dismiss QuikPak's counterclaims for breach of contract and promissory estoppel without prejudice to QuikPak asserting them in the German action, and it will deny QuikPak's request for declaratory judgment as moot.

B. Hembach's Request for the Inventory

Hembach requests the court to enter summary judgment on its Pennsylvania claims of conversion and replevin and order QuikPak to turn over either the inventory or its fair market value. He grounds this request in comity, in German law, and in Pennsylvania law.

1. Comity

Before discussing the applicability of comity, the court notes that Hembach could have brought this request under 11 U.S.C. § 304, which provides that:

> (a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.
> (b) Subject to the provisions of subsection c of this section, if a party in interest does not timely controvert the petition, or after trial, the court may--
>
> (1) enjoin the commencement or continuation of--
> (A) any action against--

(I) a debtor with respect to property involved in such foreign proceeding; or
(ii) such property; or
(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
(3) order other appropriate relief. . . .

Congress enacted section 304 to allow that:

> where a foreign bankruptcy case is pending concerning a particular debtor and that debtor has assets in this country, the foreign representative may file a petition under this section, which does not commence a full bankruptcy case, in order to administer assets located in this country, to prevent dismemberment by local creditors of assets located here, or for other appropriate relief.

Revision Notes to 11 U.S.C.A. § 304 (West 1993), quoting S Rep No. 989, 95th Cong, 2d Sess 35 (1978).

Hembach, however, cited section 304 only by analogy, and not as direct authority for his request. Indeed, attempting to distinguish cases subsequently relied on by QuikPak, Hembach argues that they are inapposite because they interpreted section 304, and he stated that he is not proceeding under that section. While section 304 seems tailor-made for Hembach, the court accepts that he does not invoke it and will not analyze his motion under that section. Certainly, to the extent Hembach opposes QuikPak's counterclaims, he need not rely on section 304, for an ancillary section 304 action in the bankruptcy court is

not the exclusive remedy for foreign debtors opposing actions by local creditors against assets located in the United States. See, e.g., Interpool, Limited v. Certain Freights of the M/VS Venture Star, Mosman Star, Fjord Star, Lakes Star, Lily Star, 878 F.2d 111, 114 (3d Cir. 1989) ("[T]he representative may, alternatively, request the court to recognize pending foreign proceedings as a matter of international comity."); Remington Rand, 830 F.2d at 1271-72 (section 304 "expresses Congressional recognition of an American policy favoring comity for foreign bankruptcy proceedings . . . [and] is not the exclusive source of comity"); In re Enercons Virginia, Inc., 812 F.2d 1469, 1471-72 (4th Cir. 1987); Cunard S.S. Co., Ltd. v. Salen Reefer Services, AB, 773 F.2d 452, 455 (2d Cir. 1985).[4]

While considerations of comity support Hembach's request to dismiss QuikPak's counterclaims without prejudice, they do not support his request that the court order QuikPak to turn over the inventory to him; relief more extensive than that granted in the non-section 304 cases just cited. Rather than merely deferring a counterclaim in recognition of the German proceedings, Hembach would have the court order QuikPak to

4. Interpool and Cunard also sanction, implicitly and expressly, the bringing of a motion to extend comity to a foreign bankruptcy proceeding in this court rather than the bankruptcy court. Interpool, 878 F.2d at 112 ("[T]he district court entered an interim order withdrawing the section 304 petition from bankruptcy court, consolidating it with the lien creditors' actions . . . ."); Cunard, 773 F.2d at 455 (that request for extending comity was made in district court rather than bankruptcy court did not require reversal).

relinquish possession of the inventory -- or its cash equivalent. The notion of comity, however, is generally more descriptive of judicial inaction than action -- "a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state . . . ." In re Maxwell, 93 F.3d at 1047. To the extent that comity sanctions judicial action as well as inaction, that action seems limited to the enforcement of a valid order obtained in a foreign jurisdiction, something the court is not presented with here.

Nor is the court's inherent, comity-based power co-extensive with its power when acting under section 304, which is an elaboration and an extension of comity, rather than its mere codification. Congress listed comity as merely one among several considerations for a court to make when entertaining a section 304 proceeding. Plaintiff having expressly disclaimed his intention of proceeding under that section, the court will not import the statutory remedies into the common law doctrine. Cf., Interpool, 878 F.2d at 114-15 ("[W]e cannot ignore the statutory scheme which the liquidator himself chose to utilize. Having filed a petition under section 304 and having secured diverse relief thereunder, the creditor now seeks to avoid the statutory

boundaries. We are neither willing nor able to allow him to do so.").[5]

2. German law

Nor, for similar reasons, will comity support ordering QuikPak to turn over the disputed inventory on the basis that under German law, QuikPak has no right to possess it. Rather than the traditional exercise of comity, i.e., showing deference by either declining to act or by giving legal effect to a legitimate order from a competent foreign court,[6] Hembach would have the court serve as a foreign bankruptcy tribunal. Unlike the request to dismiss QuikPak's counterclaims, which required an examination of the general policy framework of German bankruptcy law, entering summary judgment for Hembach based on German law would require an actual adjudication of the parties' rights under that law. Even assuming that German law provides the Estate with a statutory right to possession of the inventory, the court does not believe that it has the power to enforce the unadjudicated rights arguably conveyed by a foreign jurisdiction. See, e.g., Daniels v. Powell, 604 F.Supp. 689 (N.D. Ill. 1985).

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5. Cases like Philadelphia Gear and Remington Rand, while instructive on the general question of whether district courts should extend comity to foreign bankruptcy proceedings, are less helpful, because, unlike here, in those cases the foreign debtor was seeking to stay an ongoing action in the federal courts. See 44 F.3d at 194 n.7.

6. Of course, neither side is precluded from presenting the court with such an order in the future.

Although comity recognizes another nation's legislative as well as its judicial acts, Hilton v. Guyot, 159 U.S. 113, 163-63 (1895), it would be inappropriate to determine the parties' respective rights under German bankruptcy law, especially on the basis of limited information, as those rights are far from clear.[7] The German bankruptcy code appears to contain detailed procedures for determining the existence of a lien or an analogous interest, and thus whether QuikPak may or may not have any superior rights to the disputed inventory.[8]

3. Pennsylvania law

Finally, Hembach argues that the court may order QuikPak to turn over the inventory if it enters summary judgment on his conversion and replevin counts under Pennsylvania law.[9] In bringing this action, Hembach invoked this court's federal trademark jurisdiction and its diversity jurisdiction; because conversion and replevin are Pennsylvania remedies, the court will look to that law. See Somportex, 453 F.2d at 440.

Pennsylvania law defines conversion as:

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7. Although QuikPak has filed a claim against Amiga in the German proceedings, that claim is unproven and, even if proven, would apparently not create an enforceable lien per se.

8. For example, the court cannot determine whether, under German law, QuikPak might qualify as a bankruptcy creditor with a claim not subject to bankruptcy proceedings. See, Bernard Klasmeyer & Bruno Kubler, Business Transactions in Germany, § 17.06[4] (Berndruster, ed. 1983).

9. Fed. R. Civ. P. 64 empowers this court, when sitting in diversity, to entertain a Pennsylvania action in replevin and for conversion. See Rufenacht v. La Carte Enterprises, Inc., 465 F. Supp. 732, 732 n. 1 (W.D.Pa. 1979).

> a tort by which the defendant deprives the plaintiff of his or her right to a chattel or interferes with the plaintiff's use or possession of a chattel without the plaintiff's consent and without lawful justification . . . A plaintiff has a cause of action in conversion if he or she had actual or constructive possession of a chattel or an immediate right to possession of a chattel at the time of the alleged conversion.

Chrysler Credit Corp. v. Smith, 643 A.2d 1098, 1100 (Pa. Super. 1994) (citations omitted).

The alleged conversion occurred on September 19, 1996, when QuikPak notified a third party interested in purchasing the inventory that it was asserting ownership of the inventory. A finding of conversion would require QuikPak to pay money damages -- the fair market value of the inventory on the date it refused to relinquish possession, Welded Tube Co. of America v. Phoenix Steel Corp., 512 F.2d 342, 345 (3d Cir. 1975), but it would not require QuikPak to turn over the inventory, as conversion presupposes that the chattel itself is no longer of value to the plaintiff. QuikPak opposes the motion arguing that Amiga consented to its retention of the inventory after Amiga failed to order the 15,000 computers.

Hembach also attempts to initiate a replevin action, by which a plaintiff who has established rightful title to the chattel and an immediate right of possession may recover the chattel. Wilson v. Highway Service Marineland, 418 A.2d 462, 464 (Pa. Super. 1980).[10] In the event that the inventory cannot be

10. An action in replevin also provides for damages for the wrongful possession, but Hembach has not asserted such damages.

obtained, Hembach seeks its fair market value. See Valley Gypsum Co., Inc. v. Pennsylvania State Police, 581 A.2d 707 (Pa. Cmwlth. 1990). Hembach's approach to replevin is confusing, as he refers to both a writ of seizure and a writ of possession; cites Pa. R.Civ. P. 3170, which deals only with a writ of possession; but also argues that granting him a writ of seizure would not be prejudicial to QuikPak, as it would not entail an ultimate resolution of the parties' claims.

The court finds that it would be inappropriate to enter summary judgment on Hembach's conversion claim, as a finding for Hembach would necessarily require a determination of the existence and extent of the contractual relationship between the parties -- a determination better left to the German court. Moreover, in light of Hembach's repeated claims that QuikPak is attempting to avoid presenting its claims in the German forum, it would be ironic and unfair to permit him to do the same and thereby gain an advantage denied its opponent.

While Hembach's complaint was sufficient to institute an action in replevin, Pa. R. Civ. P. 1073, he has not discussed or followed the requirements for obtaining a writ of seizure, see Pa. R. Civ. P. 1071, et seq., and the court does not believe it has the power to issue such a writ absent a hearing, which neither party has requested. Pa. R. Civ. P. 1075.1; see also Edelen and Boyer Co. v. Kawasaki Loaders, Inc., 1994 WL 483436,

*2 (E.D.Pa. Sept. 7, 1994) (describing replevin hearing as "mandatory"). (Hembach has neither requested nor made the appropriate showing for a writ of seizure ex parte. Pa. R. Civ. P. 1075.2). Hembach may move for such a hearing, but, in order to obtain a writ of seizure, it appears that he will need to post a replevin bond for $6,300,000 -- twice the value of the inventory which he alleged in his complaint. Pa. R. Civ. P. 1075.1 (e) & 1075.3.[11]

The court is also reluctant to determine the existence of a conversion or the parties rights in replevin, because the actual status of the inventory is unclear; it appears that Amiga has sold some or all of it. The actual status of the inventory and the actual value of the parties' claims to it, if any, are better determined in the German bankruptcy proceeding. In re Rubin, 160 B.R. 269 (Bankr. S.D.N.Y. 1993).

An order follows.

11. The issue in a replevin hearing is whether the plaintiff has established his "probable right" to immediate possession, Pa. R. Civ. P. 1075.1 (e), not the ultimate merits of the parties' claims. The sole defense to a replevin action is the existence of a lien. Pa. R. Civ. P. 1082; but see Wright v. Redding, 408 F.Supp. 1180, 1183 (E.D.Pa. 1975) (permitting defendant in replevin action to assert other counterclaims).

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v.	:	
	:	
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O R D E R

AND NOW, this 8th day of January 1998, upon consideration of Plaintiff's Motion for Dismissal of Defendant's Counterclaims and for Partial Summary Judgment (Dkt. # 10); Defendants' Response thereto, and Defendants' Motion to Strike (Dkt. # 15); and, Plaintiff's Reply and Defendants' Surreply thereto (Dkt. # 16 & 17), it is hereby **ORDERED** that, in accordance with the reasoning in the attached Memorandum:

(1) Plaintiff's Motion for Dismissal of Defendants' Counterclaims is **GRANTED**, and the counterclaims are **DISMISSED WITHOUT PREJUDICE**;

(2) Plaintiff's Motion for Summary Judgment is **DENIED WITHOUT PREJUDICE**; however,

(3) Defendants' Request for Declaratory Judgment is **DENIED AS MOOT**;

(4) Defendants' Motion to Strike is **DENIED.**

BY THE COURT:

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RONALD L. BUCKWALTER, J.